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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GLENN E. CHIPP, Plaintiff and Appellant, v. THE SALVATION ARMY et al., Defendants and Respondents.	B167508 (Los Angeles County Super. Ct. No. BC270895)

APPEAL from a judgment of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Affirmed.

Law Offices of Gary R. Carlin, Gary R. Carlin, Brent S. Buchsbaum and Michael T. Carr for Plaintiff and Appellant.

Loeb & Loeb, Carla J. Feldman and Scott M. Lidman for Defendants and Respondents.

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Glenn E. Chipp appeals from the summary judgment entered against him in his wrongful termination action against The Salvation Army (The Army) and Don Gilger, an officer in The Army. The operative pleading, the first amended complaint (FAC), contains counts for wrongful termination (count 1), discrimination based on disability (count 2), retaliation in violation of public policy -- whistleblower (count 3), retaliation in violation of public policy -- federal statutory violations (count 4), hostile environment harassment (count 5), and sexual harassment (count 6). Chipp contends that there are triable issues of material fact regarding counts 1 and 3 for wrongful and retaliatory termination in violation of public policy.[1]

PROCEDURAL AND FACTUAL BACKGROUND

Chipp filed this action in March 2002, and filed the FAC in June 2002. The Army answered the FAC in October 2002. In December 2002, The Army filed its summary judgment motion. Chipp opposed the motion. The trial court granted the motion for summary judgment and entered judgment in The Army's favor on May 5, 2003. This appeal followed.

The Army's evidence in support of its motion for summary judgment tends to show the following.

Chipp was hired in November 1992 and dismissed in March 2001. He was initially hired as a bookkeeper. Chipp's duties as a bookkeeper included maintaining accurate and current financial records. He was supervised by Captain Don Gilger, an ordained minister, at The Army's Torrance Corps for the last two years of his employment. On three occasions during the first of those two years, payroll checks

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[1] Chipp's failure to assert additional counts and issues constitutes a waiver of those matters. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) Since Gilger is not named as a defendant in either count 1 or count 3, Chipp has abandoned any claim against him individually.

bounced because Chipp had neglected to transfer necessary funds. An audit revealed that Chipp's representations regarding the Torrance Corps's financial condition were not accurate. As a result, The Army removed Chipp's bookkeeping responsibilities and assigned him to work in adult daycare without a reduction in pay. His new title was adult daycare attendant and business administration assistant. A new bookkeeper was hired in September 2000.

In October 2000, The Army informed Chipp that he must immediately supply missing payroll and attendance records that he had been required to maintain. Gilger was informed that Chipp was reporting overtime hours that he claimed to have worked despite not having obtained Gilger's authorization. Gilger counseled Chipp that working unauthorized overtime could be grounds for discipline. Neither Gilger nor Peter Warner, the business development director for the Torrance Corps, ever advised Chipp to destroy overtime records or to delete overtime records; nor could they locate any employee who had worked overtime but not been paid for the overtime. The Army keeps records of overtime payment, and often pays overtime wages.

In 2000, Chipp purchased a desk and a camera for his personal use, utilizing The Army's credit card without requesting permission and in violation of policies. Chipp admitted in deposition testimony that he received no advance permission by anyone in management to make the purchases. Gilger discovered the unauthorized camera purchase in February 2001, and sought permission from divisional human resources to terminate Chipp's employment.

On March 3, 2001, Chipp stopped reporting for work. On March 5, 2001, Gilger received permission from divisional human resources to terminate Chipp's employment. Chipp reported on March 12, 2001 that he was temporarily disabled. On March 28, 2001, Gilger advised Chipp by certified letter that his employment was terminated. The termination letter states that the reason for his termination is violation of The Army's policies -- Chipp used The Army's credit card for a personal purchase and failed to inform Gilger of the purchase. Chipp did not complain about The Army's overtime practices at the time of his dismissal.

Chipp submitted declarations in opposition to the summary judgment motion. The trial court granted numerous evidentiary objections with regard to the declarations.[2] Excluding those portions of the declarations to which objections were granted, they tend to show the following.

Chipp was promoted to the position of business administrator in 1992. As business administrator, Chipp handled payroll, oversaw personnel issues, and regulated inventory. After he was removed from his bookkeeping position, Chipp began to notice changes in the way The Army handled payroll.[3] Gilger ordered Chipp to stay out of the situation.

After The Army made a transition from a manual entry timecard system to an electronic entry timecard system, Chipp observed Warner deleting employee time data reflecting overtime hours. Chipp confronted Warner about this practice in January 2001, and Warner told Chipp to keep his mouth shut. The same month, a number of employees complained to Chipp that they were not receiving compensation for earned overtime, and Chipp said he would bring the complaints to Gilger's attention. On February 15, 2001, Chipp confronted Gilger in The Army's kitchen area concerning the failure to pay overtime wages. Gilger expressed frustration, and said that employees should be dealt with by taking a tougher stance. Chipp told Gilger that if the situation was not corrected, then Chipp would bring the matter to the attention of the media.

During the fall of 2000, Chipp used The Army's credit card to purchase a camera for his personal use, intending to repay The Army. He asked the bookkeeper, Monty

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[2] Chipp failed to delete evidence to which objections were sustained in the statement of facts in his opening brief. Inclusion of those statements is not supported by the record and is therefore improper. (See Cal. Rules of Court, rule 14(a)(1); and see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

[3] The trial court sustained evidentiary objections to Chipp's statements regarding his observing Gilger manually altering timecards to reduce the number of overtime hours on grounds that the statements were vague, speculative and conclusory.

Montoya, to provide him with an invoice. Chipp told Montoya that he would pay for the purchase as soon as he received an invoice, but one was not supplied. Chipp was ostensibly fired for unauthorized use of the credit card in March 2001, but he was never questioned about the incident.

Eileen Garcia testified that on several occasions during 2000 and 2001, she was not paid overtime wages due her. She told Chipp about the situation. Garcia heard Chipp complain to Gilger that several employees were not being paid overtime, and that unless something was done, Chipp would "go public" with the information.

DISCUSSION

"A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) We review the grant of summary judgment de novo. (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1149.)

Chipp asserts two grounds for appeal: first, that the trial court erred in holding that an employee is not protected from retaliation if he or she makes a complaint to the individual in management who is engaging in the underlying wrongdoing; second, that triable issues of fact exist with regard to causation.

I. *Public policy*

To recover in tort for wrongful discharge in violation of public policy, the plaintiff must show the employer violated a public policy affecting the public rather than a merely personal or proprietary interest of the plaintiff or employer. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890.) In addition, the policy at issue must be substantial, fundamental, and grounded in a statutory or constitutional provision. (*Ibid.*)

Section 1102.5, subdivision (b) of the Labor Code prohibits retaliation against an employee for "disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation" of state or federal law. Case law has established that terminating an employee for reporting workplace activity to the employer may violate important public policies. (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 77 (*Green*).) *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117 (*Collier*) holds that section 1102.5 reflects "the broad public policy interest in encouraging workplace 'whistleblowers,' who may without fear of retaliation report concerns regarding an employer's illegal conduct." (*Collier,* at p. 1123.) Consistent with these principles, courts have recognized tortious wrongful discharge claims where an employee establishes he was "terminated in retaliation for reporting to his or her employer reasonably suspected illegal conduct by other employees that harms the public as well as the employer." (*Id.* at pp. 1119-1120.)

Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal.App.4th 1137 (*Gould*) and *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563 (*Phillips*) state that a substantial public policy is implicated when an employee complains to management about unlawful payroll practices. *Gould* holds that if the employer (MSI) discharged the plaintiff "for his reporting violations of the overtime wage law to MSI management, it violated a fundamental public policy of this state." (*Gould,* at p. 1150.) *Phillips* states that termination for asserting one's own right to receive earnings free from unlawful setoffs violates public policy. (*Phillips,* at p. 574.) According to Chipp, his claim meets the requirements for wrongful termination in violation of public policy in that he confronted Gilger and Warner about their overtime practices.[4]

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[4] Chipp doesn't challenge the underlying fact that Gilger is a wrongdoer. Chipp stated in opposition to The Army's summary judgment motion that he saw Gilger manually delete overtime from timecards. The trial court sustained an objection to that statement on the ground that it was vague, in that Chipp failed to specify where and when

The Army takes the position that no public policy is implicated because Chipp only confronted the alleged wrongdoers, rather than disclosing the activities to management. The Army relies upon *Huffman v. Office of Personnel Management* (Fed. Cir. 2001) 263 F.3d 1341 (*Huffman*) and *Rivera v. National R.R. Passenger Corp.* (9th Cir. 2003) 331 F.3d 1074 (*Rivera*) for the proposition that reporting illegal practices to the same supervisor alleged to be engaging in illegal activity is not protected. In the absence of California cases on point, we may look to decisions from other jurisdictions. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1190.) *Rivera*, based upon California law, holds that a dismissal for reporting unlawful practices to the same supervisor who is engaged in the illegal conduct does not amount to a dismissal in violation of public policy. (*Rivera,* at p. 1079 ["Rivera 'reported' the activity to Carney, the same supervisor he alleges was condoning and enforcing the illegal activity at Amtrak"].) *Huffman* holds that the federal Whistleblower Protection Act of 1989 (WPA)[5] does not apply where an employee complains to the employee's supervisor about the supervisor's own conduct. *Huffman* reasons that a confrontation does not "disclose" illegal activity to the employer, as required by the statute, because the wrongdoer already knows about the activity. Nor is it likely that the wrongdoer will investigate and remedy the wrong. Moreover, "[i]f every complaint made to a supervisor concerning an employee's disagreement with the supervisor's actions were considered to be a disclosure protected under the WPA, virtually every employee who was disciplined could claim the protection of the Act." (*Huffman,* at p. 1350.) Applying Kansas law, *Goenner v. Farmland Industries, Inc.* (D.Kan. 2001) 175 F.Supp.2d 1271 reasons that where an

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the events occurred. In his opening brief, however, Chipp asserts that Gilger engaged in the wrongdoing.

[5] The WPA is codified in scattered sections of 5 United States Code. It protects an employee from retaliation because of "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences -- [¶] (i) a violation of any law, rule or regulation." (5 U.S.C. § 2302, subd. (b)(8)(A).)

employee does not report wrongdoing to a higher authority or higher management, the report does not qualify as whistle blowing. It "is more properly characterized as a workplace dispute than a report bringing to light illegal conduct." (*Id.* at p. 1280 [the employee reported wrongdoing to the wrongdoer's subordinate].)

Chipp failed to show that his employment was terminated in violation of public policy because he did not show that he disclosed the alleged wrongdoing to anyone not participating in the wrongful acts. As a former business administrator, he would have known the proper channels to protest illegality. He nevertheless contacted no one likely to investigate and correct any potential wrongdoing, but only confronted those he believed to be wrongdoers. Chipp therefore did not act as a whistle blower. He did not go to "upper management," as was the case in *Gould*. (*Gould, supra*, 31 Cal.App.4th at p. 1146.) He did not disclose the alleged unlawful activity to "higher management," as in *Collier*. (*Collier, supra*, 228 Cal.App.3d at p. 1120.) In *Green*, the plaintiff complained to supervisory and management personnel and to the company president. (*Green, supra*, 19 Cal.4th at p. 73.) The public policy embodied in Labor Code section 1102.5 is to encourage workplace whistle blowers. Chipp's actions do not implicate that policy.

II. *Causation*

Even assuming that Chipp established a triable issue of material fact with regard to whether he engaged in whistle blowing, he cannot prevail. Chipp failed to provide substantial evidence that his employment was terminated because of that activity. To establish a claim for wrongful termination in violation of public policy, the employee must "demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1258 (*Turner*), criticized on other grounds in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498.) Thus, to avoid summary judgment, Chipp was required to present substantial evidence he was discharged because of or in retaliation for voicing his suspicions concerning the occurrence of illegal activities. (See *Turner*, *supra*, 7 Cal.4th. at pp. 1258-1259 [requisite degree of nexus is not established

where employee cannot show he was fired because of his earlier reports of illegal activities].) In order to establish pretext, the employer's knowledge of the employee's conduct is essential. (See *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70.)

Chipp's poor work performance is documented, and he concedes that he used The Army's credit card to make a personal purchase without prior authorization. Chipp nevertheless contends that the reason given by The Army for his dismissal was pretextual and that he presented sufficient evidence to raise a triable issue of fact concerning whether his termination was for complaining about the failure to make overtime payments. Chipp urges that the timing of the dismissal and Gilger's participation in the action raises an inference that he was fired in response to his confronting Gilger and Warner about overtime policy.

Chipp's position fails. Gilger successfully sought permission to dismiss Chipp for violation of The Army's policy against personal use of its credit card. Chipp failed to show that those who approved the dismissal had any knowledge of Chipp's complaints regarding overtime payments. Chipp, moreover, failed to inform any management person not involved in the alleged unlawful activity of that activity. Gilger and Warner were not likely to inform others of those charges. There is no evidence that the decision to terminate Chipp's employment was for other than the reason stated. We conclude that Chipp failed to raise a triable issue of fact regarding causation.

Flait v. North American Watch Corp. (1992) 3 Cal.App.4th 467, relied upon by Chipp, is distinguishable. There, the plaintiff complained to a highly placed corporate officer that the officer's comments sexually harassed another employee. The plaintiff's activity was found to be protected under section 12940, subdivision (f) of the Government Code,[6] which prohibited an employer from discharging an employee "because the person has opposed any practices forbidden under this part." (See *Flait,* at

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[6] Now section 12940, subdivision (h) of the Government Code.

p. 475.) The same officer to whom the plaintiff complained was responsible for his termination. The officer had knowledge that the plaintiff had engaged in protected activity, and the plaintiff was terminated a few months after he last confronted the officer. (*Id.* p. 478.)

In the present case, while Gilger participated in the termination process, he did not make the final decision. Chipp presented no evidence that the management employees who made that decision knew that Chipp had confronted Gilger and Warner regarding overtime pay. Although he was terminated about two months after his February confrontation with Gilger, there were other factors, including Gilger's discovery that Chipp had used The Army's credit card for personal use, that intervened.

DISPOSITION

The judgment appealed from is affirmed. Respondents shall recover their costs of appeal from appellant.

NOT FOR PUBLICATION.

_____, Acting P.J.

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We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST